

MOUNTAIN COUNTIES WATER RESOURCES ASSOCIATION

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April 1, 1996

State Water Resources Control Board
901 P Street
P.O. Box 100
Sacramento, CA 95812-0100

Re: Revised Notice of Preparation of
an EIR for a Water Right
Decision to Implement Objectives
Contained in the 1995 Water
Quality Control Plan for the San
Francisco Bay / Sacramento-San
Joaquin Delta Estuary

Dear Board Members:

These comments are submitted on behalf of the numerous counties and public water districts and agencies located throughout the Mother Lode Region of California which are members of the Mountain Counties Water Resources Association (Mountain Counties or Association). The Association has previously filed comments in this proceeding dated February 23, 1995 and September 19, 1995 and hereby incorporates those comments by reference. We have recently provided our input to Sen. Costa concerning his water facilities funding bill SB 900, and that correspondence is enclosed for the Board's information.

It should be stated at the outset that the Association does not currently have the financial resources to respond to the technical engineering and environmental issues raised by this proceeding. This is by way of explanation and not apology because the essence of our views are based in the protection afforded the headwater areas by the area of origin and watershed protection statutes, as well as by a fundamental faith that the outcome of the proceeding will be fair and will not take away what little water many of these watershed areas have left to provide for their own development.

Furthermore, our views have been reflected in this proceeding by individual members of our Association which are members of other participants, such as the "Upstream Rightholders" (which include our members Amador County Water Agency, Calaveras County Water District, El Dorado County Water Agency, El Dorado Irrigation District, Nevada Irrigation District, Placer County Water Agency, and the Yuba County Water Agency), as well as by individual

submittals, such as that of the Tuolumne Utilities District, the major water purveyor in Tuolumne County.

We have previously made the following points in submittals to the Board:

1. From a water supply standpoint, our physical location makes us both the most important and the most vulnerable of regions. Much of California's water supply has its origin in the Mountains and Foothills. At the same time, this water must be captured and stored in our Region if we are to have use of it, because it is the only significant supply available to us -- we have limited groundwater resources, and because water cannot be transferred upstream.

2. The greatest portion of water produced and stored in our Region is utilized by downstream agricultural and urban interests. These regions had the population and financial resources to bring the water to their people first. Now we want to use what water remains for our people and to meet our growth rate, which exceeds most other areas of California.

3. Our Region does not use enough water to cause the problems in the Bay-Delta which the Board and the CALFED processes are trying to find a solution for. We did not cause the problem and we should not be surcharged in water or money to correct it.

4. It will be very difficult and expensive for our Region to develop, to capture and store, and put its area of origin entitlements to use, because (a) the most economical sites have already been developed by downstream interests, (b) because any new development is cost-loaded by the many environmental mitigation requirements enacted since other projects were built, including the SWP and CVP, and (c) because our Region is still relatively sparsely populated and from a ratepayer standpoint cannot alone financially support a major water development project. (The Association is therefor seeking a Davis-Grunsky-type funding mechanism be included as part of Sen. Costa's SB 900).

Our February 1995 comments asked the Board in implementing its Bay Delta water rights decision and in development of its EIR and alternatives to (1) recognize and follow the area of origin and watershed protection statutes, (2) recognize the impact of the Delta exporters' diversions and require their mitigation of those diversions, (3) rely on the priority system to allocate responsibility for meeting new environmental demands on prior diverters, and not by looking to surcharge future developers of area of origin entitlements under state reservations, and (4) develop an EIR which carefully considers impacts on the environment of our Region, including any impacts caused by a lack of water because it has been made available to solve the environmental and water supply problems of other Regions. In this regard, we ask,

why should the needs of our people for an adequate water supply and jobs be any less important than any other region's needs?

Some of these same points have been recently made by the Upstream Rightholders and by TUD in their January 30, 1996 Comments to the Board and we adopt and incorporate those views.

Specifically, the Association agrees with the submittals of the Upstream Rightholders that the revised Notice of Preparation (NOP) has impermissibly allocated responsibility for meeting the Water Quality Control Plan (WQCP) to the upstream areas and has made a predetermination that the alternatives being considered will not have an adverse water supply impact on the CVP and SWP, over and above the impacts considered in the ER. (pp. 2-3 of Upstream Rightholders Comments, hereinafter "UR"). "The NOP fails to consider adequately the overwhelming data that have been presented to the State Board since 1987 that firmly establish that all (or almost all) of the decline of the Bay-Delta ecosystem is due to the operations of the state and federal export projects." (UR p.7)

The State Board must reject any alternative which fails to comply with an applicable legal standard.

The NOP, however, is inconsistent with the settled California law in a number of ways. First, the NOP misconstrues both the water rights priority system and the protections provided to areas of origin. Second, the NOP fails to respect the fact that, without an express finding of waste or unreasonable use, the State Board lacks jurisdiction over riparian and pre-1914 rights. Third, the NOP attempts to allocate the burden of providing water for public trust purposes, in direct contravention of the terms of the public trust doctrine as articulated by the State Board and the courts. (emphasis added)

(UR, p.7). The point highlighted in the quotation above is of primary importance to the Association -- indeed protection of its members area of origin rights is the Association's primary purpose, and therefore we endorse and repeat in full that section of the UR Comments from pages 9-10:

The NOP fails to recognize that in enacting the area of origin statutes, the Legislature specifically subordinated the rights of the CVP and the SWP to the needs of the areas of origin. As the Legislature noted in 1984:

"[S]tate law specifies that a watershed which can conveniently be supplied with water therefrom, shall not be deprived directly or indirectly by the federal Central Valley Project and the State Water Project of the prior right to all the water reasonably required to supply the beneficial needs of the watershed or area, or any of the

inhabitants or property owners therein ... " (Stats. 1984, ch. 1655, §1(b)).

The law of this State entitles areas of origin to the quantity and quality of water that existed prior to construction of the CVP and SWP and to whatever level of development such pre project water resources are able to support. To the extent the water needs of areas of origin conflict with the water needs of export areas, the needs of areas of origin must prevail.

These protections apply to specified "protected areas" (Water Code §1216), to counties in which water originates (Water Code §10505) and to the "watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom." (Water Code §11460).

Area of origin rights include the right of a local entity or individual to develop water supplies for local use at any time in the future. The County of Origin Law, originally enacted as Stats. 1927, ch. 286, provides that the State Board may not allow the exercise of appropriative water rights on the part of the Department of Water Resources when the exercise of such rights would deprive the county of origin of water needed for the development of the county. (Water Code §10505).

Similarly, the Central Valley Project Act, originally enacted as Stats. 1933, ch. 1042, specifically provides that an area of origin shall not be deprived of its prior right to all water reasonably required to supply beneficial uses. (Water Code §11460). The watershed thus protected extends to the entire Sacramento River Basin. (29 Cal. Ops. Atty. Gen. 136, 137 (1957)). Additionally, the Area of Origin Law, originally enacted as Stats. 1984, ch. 1655, limits the export of water from specified "protected areas." These areas include the Sacramento River System and the Delta. (Water Code §1215.5). Such exports may not deprive a protected area of the water reasonably required to adequately supply the beneficial needs of the area. (Water Code §1216)

The Delta Protection Act, originally enacted as Stats. 1959, ch. 1766, expressly incorporates protection for areas of origin contained in the County of Origin Law and the Central Valley Project Act and extends similar protection to the Sacramento-San Joaquin Delta. (Water Code §§ 12201-12204). Moreover, maintenance of Delta standards for salinity purposes are governed by the Delta Protection Act. The declaration of legislative findings within the Delta Protection Act indicates that the water collected in the Delta for conveyance to "water deficient" areas is to be "water surplus to the needs of the areas in which it originates" and that the delivery of

water for export is subject to the provisions of Water Code sections 10505 and 11460-11463. See Water Code sections 12200, 12201. Significantly, the Water Code provides that salinity control of the Delta is among the functions of the SWP, in coordination with the CVP. Water Code section 12202.

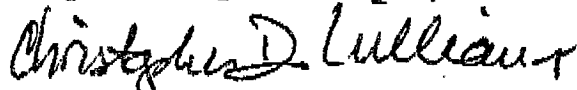
Finally, like the priority system, the area of origin protections bear heavily on the issues looming in future determinations of water policy and allocation. The rationale for area of origin protections is fairly straightforward: without such protections, no area of California with surplus water would have agreed to interbasin transfer projects like the CVP and SWP. Clearly, California will need to develop new water projects (e.g. Auburn Dam, Los Banos Grande, Sites Reservoir) in order to avoid unacceptable future water shortages. Areas of origin will not consent to such projects without the protections afforded by the area of origin statutes -- properly construed and upheld. In this way, the failure to respect the protections provided in the area of origin statutes will make it difficult, if not impossible, for the State Board to implement the WQCP effectively.

The Association believes this is a compelling statement of the Board's responsibility to protect the ability of the Mountain Counties to meet their future water demands.

We adopt as well the Upstream Rightholders support for the First EIR Alternative -- that is, that the export projects should bear the full responsibility for meeting Bay-Delta objectives because of the impacts they have caused to the Delta; support of the water right priority system; we reject the Third Alternative which proposes an allocation among watersheds; and we support the continuing attempts of the Sacramento River interests, San Joaquin interests and the California Urban Water Agencies/Agricultural Coalition to negotiate a good faith solution which does not call for a surcharge of water or money on our members.

Thank you for your consideration of our views.

Respectfully submitted,



Christopher D. Williams
Executive Director

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